



State of Idaho

DEPARTMENT OF WATER RESOURCES

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C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

December 7, 2011

Western States Land Management, Inc.
c/o Jerome Bensing
10510 Reindeer Circle, PO Box 805
Franktown, CO 80116

RE: Notice of Change in Water Right Ownership for Water Right 74-22

Dear Mr. Bensing:

In December 2010, you filed an ownership change for water right 74-22 from Hawley Creek and Big Bear Creek. Included with your ownership change was a warranty deed from Ray Kagel Jr. to Western States. The deed states that water right 74-22 was included in the sale of the property. Other water rights in the area, 74-1621 and 74-15767, were specifically withheld from the conveyance by Mr. Kagel. There is an inherent ambiguity with the deed from Kagel to Western States. We cannot complete the ownership change without additional information regarding the split of the water rights mentioned in the deed. This letter is meant to notify you of the problem with the deed and suggest ways to address the problem.

Water rights 74-22 and 74-15767 are "stacked" water rights, meaning they cover the exact same acres. Both water rights describe the irrigation of 59.3 acres. Both water rights carry the following condition: "Right Nos. 74-22 and 74-15767 are limited to the irrigation of a combined total of 59.3 acres." Stacked water rights generally cannot be unstacked or split apart. To allow water rights to be unstacked could result in an enlargement of the water rights. In other words, if Western States obtains 74-22 and Mr. Kagel retains 74-15767, there is a potential that each one would attempt to irrigate 59.3 acres, doubling the consumptive use under the rights and increasing the demand on Idaho's water supply. Enlargement of water rights is prohibited by state law. A warranty deed cannot be used to accomplish an outcome that is otherwise prohibited by law.

It is still possible for Western States to end up with right 74-22 and Mr. Kagel to end up with right 74-15767. However, the diversion rate and irrigated acres for both rights must be reduced to prevent an enlargement. The two rights, in total, cannot exceed the diversion of 2.00 cfs or the irrigation of 59.3 acres. The Kagel to Western States warranty deed does not provide any information on how such a reduction to the water rights is to be made. How many acres should each of the rights cover? What diversion rate should each right have?

An alternative to unstacking the two water rights would be to simply agree that Kagel and Western States are entitled to a portion of both rights. In other words, the rights would be

left stacked. Kegel and Western States must simply come to an agreement stating how many acres each owner gets of the 59.3 acres available.

At this point, I think it is best to return your ownership change and refund your filing fee (\$25, Receipt E036290). This will give you time to negotiate an agreement with Mr. Kegel regarding the water rights. You may re-file the ownership change with the proper filing fee when you are able to demonstrate how many of the 59.3 acres available you are entitled to irrigate. Please feel free to contact me with any questions you may have.

Sincerely,

A handwritten signature in black ink, appearing to read 'J Cefalo', written over the printed name.

James Cefalo
Water Resources Program Manager
208-525-7161

Cc: Ray Kegel (3879 E 200 N, Rigby, ID 83442)

Cefalo, James

From: Cefalo, James
Sent: Tuesday, March 20, 2012 8:10 AM
To: 'Trent Jones'
Subject: RE: Hawley Creek water rights

Mr. Jones,

Sorry for the delayed response. I have been out of the office for most of the last two weeks. I discussed this scenario with a few of the other water rights supervisors in the Department. I was told that, when this situation has arisen in the past, the base right (in this case 74-22) is always reduced to account for the flow rate dedicated to the enlargement right (74-15767). This prevents pitting two water users against each other for a limited flow rate. For example, if a condition were added to the two water Hawley Creek rights stating: "Water rights 74-22 and 74-15767, in combination, are limited to a diversion rate of 2.00 cfs," there would be a constant battle between Kagel and Western States over who is entitled to the overlapping diversion rate. I don't believe this is a viable alternative for the water right split.

Your March 1, 2012 email proposes something a little different. You propose limiting water right 74-22 to 1.36 cfs during those times when all rights are being filled on Hawley Creek. Once the 1983 priority date is curtailed (and 74-15767 is shut off), Western States would be allowed to divert the full 2.0 cfs under 74-22. This avoids any direct conflict between the water rights. I believe this is a workable alternative. Water right 74-22 would show a diversion rate of 1.36 cfs. However, we would include a condition on water right 74-22 stating something to the effect: "The diversion rate for this right may be increased to 2.00 cfs during times when water right 74-15767 (priority date of 3/15/1983) is curtailed due to a lack of flow in Hawley Creek. When water right 74-15767 is in priority and is deliverable, this right is limited to a diversion rate of 1.36 cfs."

If you want to discuss this further, feel free to give me a call. I should be in the office more regularly over the next month. Otherwise, you can move forward with finalizing the arrangement with Mr. Kagel and Western States based on this email.

James

From: Trent Jones [mailto:tjones@hallandhall.com]
Sent: Thursday, March 15, 2012 5:44 PM
To: Cefalo, James
Cc: Trent Jones
Subject: Fwd: Hawley Creek water rights

Hello James. I wanted to circle back to you to see if you had any additional thoughts on our recent discussion on rights no. 74-22 and 74-15767 from Hawley Creek. Thanks very much. Trent Jones

Begin forwarded message:

From: Trent Jones <tjones@hallandhall.com>
Subject: Hawley Creek water rights
Date: March 1, 2012 4:38:53 PM MST
To: james.cefalo@idwr.idaho.gov
Cc: Trent Jones <tjones@hallandhall.com>

James,

Thanks very much for talking with me today. I appreciate the time you've spent with me on this issue. Here's a rundown on what I was trying to ask you today. The water right that Western States would own (74-22) was originally granted at 2 cfs for 40.4 acres. Under the proposed scenario, Kagle's rights would be for 0.64 cfs to irrigate 18.9 acres, while the Western State right would be for 1.36 cfs to irrigate 40.4 acres. Together, the rights can't exceed 2 cfs and 59.3 acres. My question is whether one could structure the split so that Western State is able to utilize Kagle's 0.64 cfs when Kagle's right is turned off by the water master (Kagle's right is a very junior right and should only be "on" during the early part of the season). The net result would be consistent with how the original right was structured -- 2 cfs covering 40.4 acres. Any insight you have on this would be appreciated. Western States is hoping to put together an agreement with Kagle in short order that can be submitted to the state along with a new notice of change of ownership form. Thanks again and speak with you soon. Trent

J. Trent Jones
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